

THE KELMOOR FOX & FUR FARM, INC.

MARCH 20, 1956.—Committed to the Committee of the Whole House and ordered to be printed

Mr. MILLER of New York, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 4851]

The Committee on the Judiciary, to whom was referred the bill (H. R. 4851) for the relief of the Kelmoor Fox & Fur Farm, Inc., having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

Strike out all after the enacting clause, and insert in lieu thereof the following:

That, notwithstanding any statute of limitations or lapse of time, the Secretary of the Army is authorized and directed (1) to accept and consider any claim filed under the Act of July 3, 1943, as amended (57 Stat. 372; 31 U. S. C. 223b), within one year after the date of enactment of this Act, by the Kelmoor Fox and Fur Farm, Incorporated, of Medina, Ohio, for compensation for the loss of iridium platinum, hybrid, and silver foxes, and for related losses and damage alleged to have resulted from the operation of certain aircraft of the United States Army on April 17, 1947, and (2) to award to the said Kelmoor Fox and Fur Farm, Incorporated, any amount of compensation payable under such Act to which it would have been entitled, had such claim been filed within the time and in the manner provided by such Act.

Amend title so as to read: "For the relief of the Kelmoor Fox and Fur Farm, Inc."

STATEMENT OF FACTS

The Department of the Army in its report dated February 27, 1956, gives in detail the history of this proposed legislation and recommends favorably on the bill provided it is amended. Therefore, after a careful study of the bill and report your committee concurs in the recommendation of the department and the bill is amended accordingly. The report from the Department of the Army is as follows:

DEPARTMENT OF THE ARMY,
Washington 25, D. C., February 27, 1956.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives.*

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army with respect to H. R. 4851, 84th Congress, a bill for the relief of the Kelmoor Fox & Fur Farm.

This bill provides as follows:

"That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the Kelmoor Fox & Fur Farm, Inc., of Medina, Ohio, the sum of \$14,140. The payment of such sum shall be in full settlement of all claims of the Kelmoor Fox & Fur Farm against the United States for compensation for the loss of thirty-six iridium platinum, hybrid, and silver foxes, and for related losses and damage, resulting from the activities of certain aircraft of the United States Army which circled over such farm at a very low altitude on April 17, 1947. Such claims are not cognizable under the tort claims procedures provided in title 28 of the United States Code."

The Department of the Army is opposed to the above-mentioned bill.

The records of the Department of the Army show that on April 24, 1947, the commanding officer, Headquarters, Cleveland Army Airbase (4163d AAF Base Unit) (Res. Tng.), Cleveland Municipal Airport, Cleveland, Ohio, received a complaint in the form of a letter from William H. Kelly in behalf of the Kelmoor Fox & Fur Farm, Inc. (also known as the Peak Fox Ranch), which stated:

"On the afternoon of April 17, 1947, two Army planes flew over our ranch. The planes, I was informed by my sons, flew about 200 feet or less, flying so low we know damage was done to our breeding foxes—this being the breeding and whelping period of foxes. Extent of the damage done will require another couple of weeks to determine as we cannot disturb the kennels. We are obliged to take every precaution possible at this time to protect the animals from unnecessary disturbance."

Some weeks later, on or about May 28, 1947, Mr. Kelly orally advised an investigating officer that he and his son had checked the kennels and that they had assessed their damages at \$15,000.

On April 7, 1948, the Kelmoor Fox & Fur Farm, Inc., filed suit against the United States, under the provision of the Federal Tort Claims Act, in the United States District Court for the Northern District of Ohio, Eastern Division, seeking damages in the amount of \$14,140 for alleged damage to certain foxes as a result of activities of United States airplanes on April 17, 1947. The United States filed a motion to dismiss "for the reason that a claim was made to the

Department of the Army on or about April 24, 1947, and that such claim is still pending before the Department of the Army and has never been withdrawn." A copy of this motion to dismiss was mailed to the attorney for the Kelmoor Fox & Fur Farm, Inc., on July 9, 1948. This motion was heard on September 7, 1948, at which time the United States district judge ruled:

"Defendant [United States] should have supported its motion with affidavits, or other proof, of the claim which it alleges to be pending before the Army. Rule 2A (2) of the General Rules of this Court provides as follows:

"A. *Submission of motions.*—(2) The moving party shall serve and file with his motion a brief written statement of reasons in support of the motion and a list of citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all photographs or documentary evidence he intends to present in support of the motion in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure."

"A court action would be barred under section 931 (b) only if the claim pending before the Federal agency related to the same subject matter as the court action. *But since plaintiff [Kelmoor Fox & Fur Farm, Inc.] does not respond to or oppose the motion, it will be granted.*" [Emphasis added.]

The plaintiff did not ask for a rehearing and did not appeal.

The records of the Department of the Army show that the Kelmoor Fox & Fur Farm, Inc., did report an incident of Army airplanes having caused damage to the Kelmoor foxes; however, no formal claim for administrative settlement has ever been filed with the Department of the Army by the Kelmoor Fox & Fur Farm, Inc. Accordingly, the case has never been considered on its merits by the Department of the Army.

The act of July 3, 1943, as amended (57 Stat. 372; 31 U. S. C. 223b), provides that the Secretary of the Army may "consider, ascertain, adjust, determine, settle and pay in an amount not in excess of \$1,000, where accepted by the claimant in full satisfaction and final settlement, any claim against the United States arising on or after May 27, 1941, when such claim is substantiated in such manner as the Secretary of the Army may by regulation prescribe, for damage to or loss or destruction of property, real or personal * * * caused by military personnel * * * of the Department of the Army or of the Army while acting within the scope of their employment, or otherwise incident to noncombat activities of the Department of the Army or of the Army." The act further provides that "No claim shall be settled under this section unless presented in writing within 1 year after the accident or incident out of which such claim arises shall have occurred" and "The Secretary of the Army may report such claims as exceed \$1,000 to Congress for its consideration."

In view of the circumstances of this case the Department of the Army is of the opinion that the Kelmoor Fox & Fur Farm, Inc., should be afforded the opportunity to present its claim to the Department of the Army for administrative consideration and thereby exhaust the administrative remedy authorized by Congress, for cases of this nature, before seeking special legislation for its relief. Accordingly, it is recommended that the application of the time-limitation

provision of the act of July 3, 1943, supra, be waived for 1 year, as to the claim of the Kelmoor Fox & Fur Farm, Inc., resulting from the operation of United States Army aircraft on April 17, 1947. There follows a proposed draft of a bill designed to accomplish that purpose—

"A BILL For the relief of the Kelmoor Fox and Fur Farm, Incorporated

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any statute of limitations or lapse of time, the Secretary of the Army is authorized and directed (1) to accept and consider any claim filed under the Act of July 3, 1943, as amended (57 Stat. 372; 31 U. S. C. 223b), within one year after the date of enactment of this Act, by the Kelmoor Fox and Fur Farm, Incorporated, of Medina, Ohio, for compensation for the loss of iridium platinum, hybrid, and silver foxes, and for related losses and damage, alleged to have resulted from the operation of certain aircraft of the United States Army on April 17, 1947, and (2) to award to the said Kelmoor Fox and Fur Farm, Incorporated, any amount of compensation payable under such Act to which it would have been entitled, had such claim been filed within the time and in the manner provided by such Act."

The cost of this bill, if enacted in its present form, would be \$14,140.

The Bureau of the Budget advises that there is no objection to the submission of this report.

Sincerely yours,

WILBER M. BRUCKER,
Secretary of the Army.

AN OUTLINE OF OUR CLAIM WITH THE UNITED STATES ARMY AND HOW IT HAS PROGRESSED TO DATE

DESCRIPTION

1. A description of the two Army planes zooming over our fox ranch. This letter to the commanding officer, 4163 Base Unit (Reserve Training), Cleveland Municipal Airport, Cleveland, Ohio, confirmed my conversation with Captain McMurray at the airbase on the morning of April 18, 1947.

I also called the airbase shortly after the zooming took place. It was very difficult to get the call through because of the telephone strike in our area at the time.

Also included is a copy of a letter written by John R. Kelly on April 25, 1947.

Statements by two neighbors who also saw the low-flying planes.

STATEMENT ON ACTION TAKEN BY US

Talking with officers at the 4163 Base Unit we advised them of our loss.

Then the question arose as to where we should file claim.

Our cause has been somewhat of a merry-go-round ever since.

After getting no place with the Army, we followed their advice by filing suit with the United States district court. Taking the claim

to court was very hard for us for capital after the loss was very limited.

I would like to give a background of our ranch operation to this time.

Before World War II, we had many more foxes. During the war my sister served with the Red Cross in England, my brother, Jack, served with the Army in Europe and I served with the United States Air Force. During this period mother and dad struggled to keep the home front going and hold a limited herd of foxes so we could again continue after the war. We were again building our herd when this zooming took place.

COPY OF MOTION TO DISMISS CLAIM

1. We were stunned when the court action came to dismiss the case because there was a claim pending with the Department of the Army and was still pending there, after they advised us we would have to file claim in the United States court. We at this time could not spend the money to try to keep it in court.

Again we felt it was just being pushed around.

2. My father, Mr. W. H. Kelly, Sr., had worked along on the case to this point. The strain was so great that his health was endangered. Every time the matter was brought up he was very greatly depressed. We felt during that period of time the claim could never balance Dad's health. Then I made a solemn vow to myself that if the time came when I could follow the claim through I would do my best to get our just due.

My father's health is better now but the scars from the loss of our business are still very deep.

OUR CLAIM

In asking this claim—as breeders our iridium platinum foxes were valued at \$1,000 and \$110 as pelts.

The hybrid and silver foxes at \$200 as breeders and \$20 as pelts.

Once a female fox destroys her young she is never a good mother after that. We found in the following breeding season that our loss was much greater than at the time we made the claim. The females were so nervous at whelping time they could not raise their fox pups.

We feel this claim is a very minimum claim for our great loss and we feel the United States Army owes us this loss.

AD FROM THE NEW YORK HERALD TRIBUNE

This ad appeared April 13, 1947—just 4 days before the planes zoomed our ranch. My father had worked hard and long to establish a clientele of this type. His long planned dream was coming true until April 17 when the production on our ranch was ruined.

I am enclosing a brochure compiled by my father, W. H. Kelly, Sr., giving the history of our iridium platinum fox.

Enclosed is clipping of a settlement made June 3, 1952, for a similar loss.

WILLIAM H. KELLY, Jr.

KELMOOR FOX & FUR FARM, INC., CLAIM AGAINST UNITED STATES ARMY

The Kelmoor Fox & Fur Farm, an Ohio corporation, engaged in the production and breeding of iridium, hybrid, and silver foxes, is located near Medina, Ohio, on R. F. D. No. 4.

For many years, through interbreeding we had worked to develop an iridium platinum fox. Said iridium platinum fox was developed and we had built up an exclusive clientele in New York City.

On April 17, 1947, at about the hour of 5:30 p. m., six United States Army planes left the airfield in Akron, Ohio, to fly to the municipal airport in Cleveland, Ohio. Two of said planes left the squadron and circled over our fox ranch at the low altitude of under 200 feet. Kelmoor Fox & Fur Farm had at the time 73 breeding female foxes and the low flying planes caused the foxes to be thrown into utter confusion, causing many of the mother foxes to eat or kill their young. The losses suffered were as follows:

- Progeny of 9 pairs of iridium platinum foxes or 27
- Progeny of 2 pair of hybrid foxes or 6
- Progeny of 1 pair of silver foxes or 3

The Kelmoor Fox & Fur Farm also lost business due to not being able to fill orders; lost through not being able to increase its breeders for the season of 1948; females after they once kill their young do not prove to be good mothers thereafter.

These iridium platinum foxes are the result of selective breeding over a period of years and are registered under trademark No. 360980, United States Patent Office, under date of March 8, 1938.

Monetary losses because of the tortious conduct of said United States Army plane pilots were as follows:

Loss of 27 iridium platinum foxes:	
5 for breeders at \$1,000 each	\$5,000
22 at \$110 each (pelts)	2,420
Loss of 6 hybrid foxes:	
2 for breeders at \$200 each	400
4 at \$20 each (pelts)	80
Loss of 3 silver foxes:	
1 breeder at \$200	200
2 pelts at \$20 each	40
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	8,140

The following losses were also sustained:

- (a) Loss of business due to not being able to fill orders.
- (b) Loss through not being able to increase our herd of breeders for season of 1948.
- (c) Females after they once kill their young are a gamble as they do not prove to be good mothers.
- (d) Family hardships—financial problems with the loss from seventy-two (72) less foxes to help meet the expenses of 1948.

A reasonable value of these losses is	6,000
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Total loss	14,140

KELMOOR FOX & FUR FARM, INC.,
R. F. D. 4, Medina, Ohio, April 24, 1947.

COMMANDING OFFICER,
4163 Base Unit (Reserve Training),
Cleveland Municipal Airport, Cleveland, Ohio.

DEAR SIR: This is to confirm my conversation with Captain McMurray regarding the damage caused on our ranch by Army planes late Thursday afternoon, April 17, 1947.

There were six planes flying west out of Akron and it looked as if they were flying over State Route No. 18. When they were south of the ranch two planes broke from the rest and flew over our ranch and as they banked and returned they zoomed down to a very low altitude directly over the center of our ranch. As they flew over my head I was able to see the star and bar, the insignia of an Army plane. They were low winged, single engine, two-seated Army planes with enclosed cockpits. I read the number on the wing of the lead plane as TA-89. I feel this number is not complete but I could not distinguish the other digit.

I estimate that they were flying under 200 feet and the noise was very great. After they flew over I immediately went to our tower where I could check the ranch from a high point and found that the whole ranch was in a turmoil. This is whelping season—a very critical period on the ranch.

The above incident caused considerable damage on our ranch.

Very truly yours,

WILLIAM H. KELLY, Jr.,
Ranch Superintendent.

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